ment potentiality or of the use to which the intending purchaser would put to such land. Mr. Chan Siew Yoon drew my attention to a passage at page 916 of *Cripps'* Compulsory Acquisition of Land, 11th edition where it is stated that —

"Where, however, the land has potentialities beyond its present use which can only be realised by his giving up possession for exploitation by the purchaser, and the owner is entitled to the value of these potentialities, the land has two values to him, (i) the existing use value and a right to compensation for disturbance, and (ii) the potential value; and he is entitled to whichever is the higher."

He submitted that in the present case, the land has agricultural value and development potential and the potential value should supersede the agricultural value. There is some validity in the argument although this may not be true in every case. It depends largely on the degree of the development potentiality and the extent to which it exceeds the existing use value.

Having regard to all the material evidence produced before this court, I am firmly of the opinion that $5,000 per acre would be a fair market value in respect of the land acquired as at 3rd January, 1963. With respect I disagree that $7,500 per acre should be awarded.

The amount the court awards exceeds the sum awarded by the Collector of Land Revenue but the claim of the owners was so excessive that I consider it fit that the owners should pay their own costs and half the costs of the collector (section 51(1)(b). Land Acquisition Act). I also order that each assessor shall receive a fee of $100 for each day's hearing that is, the 20th, 21st and 22nd of October, 1971 and a sum of $50 for this day the 29th day of December, 1971 and the fee paid to the assessors shall constitute costs in the proceedings.

Interest on difference of sum awarded by the Collector of Land Revenue and the court at 6% shall be paid to the applicants with effect from date of possession.

Order accordingly.

Solicitor: *Shook Lin & Bok.*

LIEW KUM KIEW v. COMMISSIONER OF THE FEDERAL CAPITAL OF KUALA LUMPUR

[O.C.J. (Abdul Hamid J.) January 7, 1972]

[Kuala Lumpur — Originating Motion No. 2 of 1969]

Local Government — Planning permission — Refusal by commissioner — Exercise of powers — Town Boards Enactment (F.M.S. Cap. 137), s. 145(ii).

Specific Relief — Enforcement of public duties — Exercise of power by local authority — Whether ultra vires — Specific Relief (Malay States) Ordinance, 1950, s. 44.

This was an application by a registered proprietress of land for an order that the respondent be directed to give planning permission. The said land is within the municipal boundary but not covered by the approved town plan.

It was averred that in 1964, the applicant asked for planning permission to erect an additional two-storey shophouse on the said land. This site plan was disapproved. The applicant's appeal was dismissed. The ground for refusal was that the new road improvement line would affect the portion under appeal.

The applicant contended that the ground for refusal was *ultra vires* as the new road improvement line had not been gazetted. A further contention was that as the area had not been included as part of the approved town plan, the proposal for the new road improvement line could not have any effect.

The respondent contended that the new road improvement line need not be gazetted, and although the said land was not included as part of the approved town plan, the respondent had power to prescribe a regular line of street.

Held: the commissioner is empowered to refuse approval of a plan for any new building to be erected upon any land in respect of which the preparation of a lay-out plan has been made. The commissioner had rightly exercised the powers given under section 145(ii) of the Town Boards Enactment and therefore had not in any way acted *ultra vires* his powers.

MOTION.

N. A. Marjoribanks for the applicant.

Abdul Hamid Azmi and *R. Padmanabhan* for the respondent.

Cur. Adv. Vult.

Abdul Hamid J.: This is an application by Liew Kum Kiew of 201, Klang Road, Kuala Lumpur (hereinafter referred to as "the applicant") the registered proprietress of land contained in Lot 1251 situated at 4th Mile, Klang Road, Kuala Lumpur (hereinafter referred to as "the said land"). The said land is within the municipal boundary but not covered by the approved town plan.

The applicant prays for an order that the respondent, that is, the Commissioner of the Federal Capital be directed to give planning permission in regard to site plan No. 6299.

It is averred that in 1964, the applicant asked for planning permission to erect an additional two-storey shophouse on the said land as shown in plan No. 6299. This site plan was disapproved. The applicant's appeal was dismissed. The ground for the refusal is that the new road improvement line will affect the portion under appeal. The applicant refers to two letters from the respondent, LKK1 dated 29th April, 1966 and LKK2 dated 10th November, 1967 as follows —

LKK1: "Application for development of one 2-storey shophouse on Lot No. 1251 4th Mile, Jalan Klang, Kuala Lumpur

With reference to your letter No. T/1917/65 dated 19th July, 1965 regarding the above subject, I am directed to inform you that your appeal for reconsideration has been refused by the Pesurohjaya on the grounds that the provisions of section 115A of the Town Boards Enactment are being enforced and that the lot was surveyed for one shophouse with a 20 feet building line."

LKK2: "Permintaan memajukan tanah untok proposed additional two-storey shophouse on Lot 1251 4th Mile, Jalan Klang, Kuala Lumpur

Berhubong dengan permintaan tuan bagi memajukan lot tuan yang tersebut bertarikh 20.7.67, saya di-arahkan untok memberitahu ia-itu permintaan tuan tidak di-luluskan oleh Pesuroh Jaya Ibu Kota Kuala Lumpur.

2. Permintaan ini ada-lah di-tolak dengan alasan yang berikut:- on grounds that (i) The new road improvement line will affect the portion under appeal, and (ii) Appellant was aware of layout No. L.722."

It is the applicant's contention that the ground of refusal is *ultra vires* as the new road improvement line has not as yet been gazetted. It is the applicant's further contention that as the area had not been included as part of the approved town plan, the proposal for new road improvement line cannot have any effect.

An affidavit in reply to the applicant's affidavit was filed on 9th February, 1971 by A.J. Morris, Senior Technical Assistant of the Town Planning Department on behalf of the respondent. It is admitted that an application was made and it was refused. It is, however, the respondent's contention that the new road improvement line need not be gazetted and although the said land was not included as part of the approved town plan, the respondent has power to prescribe a regular line of street.

The following facts as deposed by the respondent in the affidavit of A.J. Morris are not in dispute. In May, 1960, the respondent prepared a draft lay-out plan for the said land (L623A) which indicated the new road improvement line. It permits the erection of 6 terrace houses and 6 shophouses on the said land.

In July, 1962, a fresh lay-out plan permitting 8 terrace houses and 8 shophouses to be erected thereon (L722) was prepared. This was delivered to the applicant for her to comply with in future application for planning permission.

On 15th January, 1963, applicant sought planning permission to erect 8 terrace and shophouses on the said land. As it complied with plan L722, approval was given. The applicant then applied to the Collector of Land Revenue for sub-division and the issue of separate titles to the said land in accordance with L722. The Collector of Land Revenue requested the respondent to prepare a requisition of survey plans. This was done and it was submitted to the Collector of Land Revenue (R.S. Plan 48/63 — 30th April, 1963).

The said land was sub-divided and 17 separate new titles were issued and registered in the Land Registry.

The respondent says that the applicant was fully aware of the new road improvement line and only one building was allowed on new Lot 5716. Since the application is to erect two buildings on new Lot 5716, it could not therefore be approved as it was not in accordance with draft lay-out plan L722 and requisition of survey plan 43/63.

The respondent also says that the applicant by her conduct is estopped from raising an objection to the road alignment proposal as shown on L722. It is argued that the respondent has powers to reject any plan for a new building on any plan in respect of which there exists a lay-out plan

Now, in the instant case, it is not in dispute that the new road improvement line has not been gazetted and it is also not in dispute that the said land has not as yet been included as part of the approved town plan.

Mr. Marjoribanks counsel for the applicant first of all referred to section 106(i) of the Town Boards Enactment (Cap. 137) and submitted that under this section, the regular line of a street requires publication in the *Gazette*. Enche Abdul Hamid Azmi counsel for the respondent pointed out that section 106 is not applicable to the present case in view of G.N. (Selangor) 469 dated 17th August, 1950. This section was not extended to apply to the Municipality of Kuala Lumpur. I agree with Enche Abdul Hamid. The relevant section seems to be section 107 of the Municipal Ordinance. Under this section, the commissioner may, with the sanction of the State authority prescribe a line on each side of a public street within which no portion of any building abutting on the said street shall, after such line has been prescribed, be constructed. This line prescribed is called the regular line of the street. Unlike section 106 of the Town Boards Enactment, this section does not require publication in the *Gazette*.

Mr. Marjoribanks then referred to section 115A(i) of the Town Boards Enactment which states that —

"The Board may at any time fix a line (hereinafter called the building line) on each side of any street.",

and thereafter referred to section 143(i) of the Town Boards Enactment which reads —

"Whenever it appears to the Board that any land is in the process of development the Board may prepare a lay out shewing any of the things for which provision may be made under section 136 (i) which it deems necessary to secure proper sanitary conditions, amenity and convenience in connection with the laying out and the use of such land and of any neighbouring lands."

He argued that these sections apply to the land in question. I do not think the respondent is disputing the applicability of these sections. In fact the respondent acted in accordance with the power provided under section 115A(i) in fixing the building line and in accordance with section 107 of the Municipal Ordinance in prescribing the regular line of a street. As the applicant's land was to be developed or, shall I say, in the process of development, it became necessary to prepare a lay-out plan. Lay-out plans L623A and L722 (as subsequently amended) were in effect prepared in accordance with section 143(i) of the Town Boards Enactment. It is clear that under subsection (ii) of section 143, the provisions of section 137 to section 141 both inclusive shall apply to the preparation of such plan. In other words, the draft lay-out plan must be exhibited, advertised in the newspapers and notified in the *Gazette* stating the place and time of inspection (section 137); objections have to be considered (section 138); draft plan has to be submitted to the Ruler in Council (section 139) for approval and disapproval by the Ruler in Council (section 140) and the notification in the *Gazette* of disapproval or approval by the Ruler in Council (section 141).

It is also clear that once a draft lay-out plan is approved by the Ruler in Council, it shall become part of the approved plan [sub-section (iii) of section 143] and consequently the erection of any building on the land covered by the draft plan will have to comply with the lay-out plan. The board is clearly em-

powered to reject a plan of any new building if such plan is not in conformity with the approved plan [section 145(i)].

Mr. Marjoribanks argued that since the road improvement line in lay-out plan L722 has not as yet been gazetted, the commissioner had not therefore the power to refuse planning permission. I do not see the validity of this argument. Even before a draft lay-out plan is approved by the Ruler in Council, the commissioner, I think, is equipped with the power to control erection of buildings on land covered by a lay-out plan, that is to say, he is empowered to refuse approval of a plan for any new building to be erected upon any land in respect of which the preparation of a lay-out plan has been made. Section 145(ii) of the Town Boards Enactment seems to be relevant to the present case.

Section 145(ii) reads as follows —

"The Board may refuse to approve the plan of any new building or of any private street to be erected or made upon any land in respect of which the preparation of a draft plan or lay-out has been authorised by the Board."

For these reasons, I think the commissioner had rightly exercised the powers given under sub-section (ii) of section 145 of the Town Boards Enactment when he refused the building permission of an additional two-storey shophouse as it did not comply with lay-out plan L722. He had not in any way acted *ultra vires* his powers.

In view of my finding, I do not propose to deal with the question of estoppel.

I would therefore dismiss this application with costs.

Application dismissed.

Solicitors: *Lovelace & Hastings; Shook Lin & Bok.*

AMPANG ESTATE LTD. v. GUAN SOON TIN MINING CO.

[O.C.J. (Abdul Hamid J.) January 7, 1972]

[Kuala Lumpur — Civil Suit No. 742 of 1968]

Land Laws — Right of support — Land in its natural state by adjacent land — National Land Code, ss. 44(1)(b), 282 & 291.

Mining — Right of support — Operations on adjacent land — Duty of care — Presence of superimposed structure — Effect of — Whether land 'in its natural state' — Mining Enactment (Cap. 147) ss. 11(v), 16(vi), 61, 65 and 134.

Damages — Mining operations — Damage to adjacent property — Quantum.

The plaintiffs are a housing development company and the defendants are miners operating a tin mine adjacent to the plaintiffs' estate. The plaintiffs claimed for damages to their land in the sum of $103,669.25.

It was alleged that the defendant firm, carrying on mining operations, worked the mine and had extracted minerals within and under its land causing thereby the withdrawal of support to the plaintiffs' land, in consequence of which the plaintiffs' land was damaged. It was also alleged that the defendant firm continued and threatened to continue the said workings in such a manner as would inevitably cause further damage to the plaintiffs' land.

On March 2, 1967, a prohibition order was served on the defendants by the mines department requiring them to cease mining operations in the area adjacent to the plaintiffs' land.

The plaintiffs contended that the defendants right to work the said mine as conferred by the mining title under the Mining Enactment (Cap. 147), was subject to the conditions that the defendant firm, its partners, servants or agents should pay compensation for all damages as might be caused by reason of such workings, to the owners and occupiers of the surface thereover or adjacent thereto.

The defendants contended that the plaintiffs were not entitled to any right of support and that they had at no time acquired such right.

The question that arose for determination was whether the defendants, as owners of land adjoining that of the plaintiffs' and upon which the defendants were licensed to carry out mining operations, were under a legal obligation to support the plaintiffs' land and if they were, whether the presence of a concrete drain on the plaintiffs' land disentitled the plaintiffs to this right of support. Therefore, it was necessary to determine whether the plaintiffs' land fell within the category of land in its natural state within the meaning of section 44(1)(b) of the National Land Code

Held: (1) on the facts available, it was clearly established that the defendants not only carried out mining operations on their land adjacent to the plaintiffs' land before the slip occured, but continued to do so despite the prohibition order issued by the mines department. The subsidence was solely, caused by the mining operations carried out by the defendants resulting thereby in the withdrawal of support of the plaintiffs' land;

(2) at common law, the right to support of land is one of the ordinary and inseparable incidence of ownership though its exercise requires an adjacent owner to forebear from doing something on his land that otherwise he would be free to do. The owner of land *ex jure naturae* has a right only to so much support to his neighbour's land as will support his own land unencumbered by buildings;

(3) the issue of a licence to mine is merely to confer on the licensee only such right to win specified mineral from the land. The licensee must, however, remain subject to the adjoining owner's statutory right to support. The Mining Enactment made it abundantly clear that a person granted a licence to mine, is not relieved from liability in respect of damage caused to a person's property;

(4) there was no evidence to warrant a finding that the superimposed structure, namely the concrete drain, caused the land to subside. The subsidence that resulted in the withdrawal of support of the plaintiffs' land was solely caused by the wrongful acts of the defendants, and in no way was caused by or contributed to by the presence of the drain;

(5) therefore, the defendants were liable for the damage caused to the plaintiffs' land.

Cases referred to:-

(1) *Backhouse* v. *Bonomi* 4 L.T. 754 at p. 755.

(2) *Dalton* v. *Angus* L.R. 6 App. Cas. 740; [1881-5] All E.R. Rep. 1.

(3) *Geddis* v. *Proprietors of Bann Reservoir* (1878) L.R. 3 App. Cas. 430.

(4) *Guan Soon Tin Mining Co.* v. *Wong Fook Kum* [1969] 1 M.L.J. 99.

(5) *Brown* v. *Robins* 157 E.R. 809.

(6) *Stroyan* v. *Knowels; Hamer* v. *Knowels* 158 E.R. 186.

(7) *Bonham-Carter* v. *Hyde Park Hotel* 64 T.L.R. 177 at p. 178.